U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 August 2003

CASE NO.: 2003-STA-00031

IN THE MATTER OF

NELSON HOGQUIST,
Complainant

v.

GREYHOUND LINES, INC.,
Respondent

APPEARANCES:

NELSON HOGQUIST
Pro se Complainant

DARREN S. HARRINGTON, ESQ.
On behalf of the Respondent

Before: LARRY W. PRICE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
(Denying Complaint)

This case arises under the "whistleblower" protection of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter STAA), 49 U.S.C. § 31105, and the regulations at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms or conditions of employment.

Complainant was employed as a bus driver for Respondent from March 1998 until he was terminated as a result of the events which form the core of the present dispute. On January 15, 2003, Respondent terminated Complainant for alleged continued federal Department of Transportation log violations and company pay claim violations. On January 22, 2003, Complainant filed a complaint with the Department of Labor alleging that Respondent had discriminated against him in violation of Department of Transportation regulations and the STAA. Following an investigation, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, dismissed the complaint on April 18, 2003. On May 1, 2003, Complainant filed a notice of objection and a request for hearing with the Office of Administrative Law Judges.

A formal hearing was held in Laredo, Texas, on June 17, 2003, where the Parties were afforded full opportunity to present testimony, submit documentary evidence and give oral arguments. The following exhibits were received into evidence:[1]

1. Complainant's Exhibits A-L;
2. Respondent's Exhibits 1-16; and
3. Court's Exhibit 1.

STIPULATIONS

At the commencement of the hearing, the Parties stipulated, and I find:

1. Respondent is engaged in interstate operations and maintains a place of business in Laredo, Texas. During the regular course of business, Respondent's employees operate commercial motor vehicles, principally to transport passengers and common freight. (Tr. 29-30).

2. At all material times herein, Respondent has been an employer as defined in Section 311.013 of the STAA. (Tr. 30).

3. Respondent hired Complainant as a driver of commercial motor vehicles having a gross vehicle weight rating in excess of 10,001 pounds. (Tr. 30).

[1] The following abbreviations will be used in citations to the record: Complainant's Exhibit–CX.; Respondent's Exhibit–RX.; Court's Exhibit–JTX.; Transcript of the proceedings–Tr.; Complainant's Brief–CB.; Respondent's Brief–RB.

4. At all material times herein, Complainant was an employee driving a commercial motor vehicle used on the highways to transport passengers and common freight, and in the course of his employment directly affected commercial motor vehicle safety. (Tr. 30).

5. Complainant's claim in this case was timely filed. (Tr. 30).

ISSUES

The unresolved issues in this proceeding are:

1) Whether Complainant engaged in protected activity under the STAA; and

2) If so, whether Respondent took adverse employment action against Complainant due to this protected activity.

FINDINGS OF FACT

Based upon the hearing testimony, supporting evidence and briefs of the parties, I make the following findings of fact:

1. Complainant has bachelor's degrees in mathematics and law studies and criminal justice and Chinese language studies. (Tr. 147). In March 1998, Complainant began working as an extra board bus driver for Respondent. He worked out of Laredo, Texas, and San Antonio, Texas, on various schedules and assignments. (Tr. 31-32). During his term of employment, Complainant had a good driving record with no safety problems as well as a reputation for good customer service. (Tr. 259, 266).

2. Respondent's drivers classify their log time while working in one of three ways: off duty, driving and on duty not driving. (Tr. 15). Drivers cannot drive more than ten hours a day, be on duty more than fifteen hours a day or drive more than seventy hours in eight days. (Tr. 151). If a driver has no responsibilities at a given time, he is considered off duty for that period of time. (Tr. 140). The driving log is supposed to reflect the driver's actual driving time. (Tr. 152). On duty not driving time is logged when, for example, a driver is riding on a bus to fill in for a position at another station. In addition, for each run, the driver must perform a thirty minute pre-trip inspection and a fifteen minute post-trip inspection. Both inspections are logged as on duty not driving time. (Tr. 25-26, 153-54). Off duty time occurs

when a driver is relieved of all duties and may leave the premises. (Tr. 152-53). In between tours, when a driver has two or three hours relief from duty, he is considered by Respondent to be off duty. (Tr. 154). The purpose of logging off duty during these times is to ensure that drivers do not run out of hours in the seventy hour/eight day period. (Tr. 233).

3. Respondent employs two types of drivers: regular drivers and extra board drivers. Extra board drivers receive protection pay. (Tr. 21-22). Protection occurs when a driver is called down a few hours before a scheduled run departs, and this time is logged as on duty not driving. (Tr. 156-57). Only the dispatcher has the authority to place a driver on protection. (Tr. 142, 157, 168). Extra board drivers are typically used for open assignments. When a regular driver is on vacation, the extra board drivers bid on his runs. Extra board drivers also work extra sections, as when a bus is full and another bus is needed to accommodate the additional passengers. The extra board driver earns protection pay from the time he reports to work to the time he actually begins driving. Usually the dispatcher assigns a complete run to the extra board driver, but occasionally the extra board driver may be assigned only one segment of a run or called off a run in order to fulfill another assignment. (Tr. 158-60).

4. A regular driver is not entitled to claim protection pay for the off duty time between runs. (Tr. 25-26). In addition, an extra board driver is not entitled to claim protection pay if he is in the midst of completing a run. (Tr. 25-26, 93, 134). In other words, a driver cannot get protection pay and driving pay at the same time. (Tr. 141). When Complainant worked for Respondent, the scheduled driving pay rate was $19.08 per hour and the protection pay rate was $9.66 per hour. (Tr. 156). Regular drivers are paid a set amount of money for the entire time between signing on and signing off on a run. (Tr. 136, 162). For example, a driver is paid $144.14 for a run between San Antonio, Texas, and Brownsville, Texas, and this amount includes all time from sign on to sign off. (CX. H, p. 1; Tr. 136, 163-64). If an extra board driver is assigned to an entire regular run, he cannot claim protection pay for the down time between each leg of the run, because he is already obligated to complete the run which was assigned and is paid the set amount for that run. (Tr. 137-38, 140, 162).

5. Pursuant to Respondent's procedures there is only one set way of filling out a driving log, and a driver has no discretion in how he fills the log out. (Tr. 157). Although Respondent never gave Complainant written directions about when to log on duty and off duty, Respondent did provide Complainant and

all other employees with a copy of the Federal Motor Carrier Safety Regulations, which contain the legal definition of "on duty." (Tr. 96, 229-30).

6. Although Respondent utilizes a system of progressive discipline, it is not always necessary to proceed with each disciplinary step before terminating an employee. (Tr. 280).

7. Prior to January 2002, before becoming a union steward, Complainant filed many grievances and pay claims. There is no evidence that any of these involved protected activity under the STAA. (Tr. 250). During the time period from February 12, 2002, through January 15, 2003, Complainant filed numerous complaints with National Local Union 1700, both on his own behalf and on the behalf of other bus drivers, alleging various violations of the Federal Motor Carrier Safety Regulations. (CB. p. 1, 2). One such grievance, filed on June 2, 2002, alleged that Respondent's schedules did not conform with speed limits, such that drivers took longer than the scheduled time for a run but were not paid any extra money to reflect that fact. (CX. A, p. 77). Another grievance, filed February 9, 2002, alleged that drivers who took unauthorized stops were being unfairly punished and harrassed for doing so. This grievance concerned granting passenger rest/meals stops beyond those scheduled. (CX. A, p. 100 - 102).

8. On June 2, 2002, Complainant filed a Charge Against Employer with the National Labor Relations Board allegeing that district manager Roland Rose utilized intimidation and harassment tactics to prevent drivers from making rest stops. (CX. A, p. 66). On March 11 and 16, 2002, Complainant reported a health hazard to the U.S. Department of Health and Human Services concerning restroom sanitation and restroom breaks. (CX. A, pp. 95-96). On January 13, 2003, Complainant filed a Notice of Alleged Safety or Health Hazards with OSHA, alleging that Respondent required its drivers to log on duty time as off duty time in order to escape federal regulations on driving time. (CX. A, p. 13). On January 14, 2003, Complainant wrote a letter to the Federal Motor Carrier Safety Administration (FMCA) alleging that Respondent had asked him to falsify his logs in violation of federal safety regulations. (CX. A, p. 12).

9. Complainant had issues with filling out his logs and pay claims. With regard to the pay claims, Complainant would turn in duplicates or claims for one assignment when he had actually been driving another assignment. (Tr. 171, 255). In addition, Complainant logged on duty time when he was technically off duty and free of responsibilities, seeking pay for this time. Complainant

filed a pay claim with the Texas Workforce Commission. As early as February 14, 2002, Respondent became concerned about Complainant's tardy claims for protection pay on trips that occurred as early as August 2001. (RX. 10; RX. 15, pp. 1, 18, 38). By March 26, 2002, Respondent determined that Complainant needed a refresher course on pay claim procedures and Roland Rose, the district manager for driver operations, scheduled a refresher course to instruct Complainant on how to comply with company policy on these issues. (Tr. 256-58; RX. 16).

10. On April 2, 2002, Complainant met with William Douglas, a driver instructor, for a refresher course on how to fill in his driver log and pay claims. (Tr. 81-82, 129-30). Mr. Douglas told Complainant that his pay claims must match the logs and the VRU system. (RX. 14, p. 9). Mr. Douglas told Complainant to check the payroll screen to see if he had been paid before submitting a pay claim to his supervisor. (Tr. 106-07). In addition, Mr. Douglas explained that pay claims should be filed in a timely manner. (Tr. 299). He also advised that when driving on a scheduled tour with a break of three hours and forty-five minutes, Complainant's log should reflect that he was off duty for two hours and forty-five minutes and that Complainant was not entitled to protection pay for this time. (RX. 14, p. 9). Complainant told Mr. Douglas that he would continue to log this time as on duty not driving, rather than off duty. (Tr. 298).

11. On May 22, 2002, Complainant received a written warning for failing to submit twenty-one pay claims, dated from February 2, 2002, through May 4, 2002, in a timely manner as per company policy. The notice contained a reminder that employees are to submit pay claims for pay no later than twenty-four hours after completion of a work assignment. (RX. 2; Tr. 108-10, 130).

12. In a letter dated June 3, 2002, Phillip Zendejas, the border manager in Laredo, denied a grievance in which Complainant alleged harassment by district manager Mr. Rose and claimed that he had not violated any rules in submitting late pay claims. (RX. 3; Tr. 113-14). In a letter to Complainant's union representative dated August 12, 2002, Mike Chinn, a driver manager, noted that Complainant's grievance was not timely appealed to Step 3, and the grievance remained denied. (RX. 4).

13. On October 12, 2002, driver supervisor Kenneth Padalecki denied another grievance filed by Complainant regarding payroll issues dating from February 2, 2002, through August 14, 2002. Mr. Padalecki noted that although he was denying the grievance, Complainant's pay claims would be reviewed and any money due and owing would be paid. (RX. 5; Tr. 119).

14. On December 11, 2002, Mr. Douglas wrote up a memo detailing a second refresher course with Complainant. Mr. Douglas instructed Complainant that when he arrived in San Antonio at 1:45 a.m., he was relieved of all duties and was not to report to duty again until 3:50 a.m. to drive back to Laredo. He told Complainant that he was not entitled to protection pay for this time. Complainant told Mr. Douglas that since he was an extra board driver, he was entitled to protection pay, but Mr. Douglas explained that Complainant would only be on protection if the dispatcher told him that he was on protection. (RX. 14, p. 16). Complainant told Mr. Douglas that he would continue to log his time the way he had always done it. (Tr. 301). Mr. Douglas told Complainant that if he pursued his complaints through the union, he would be helping all the other drivers, but he also told Complainant that he needed to correct the way that he was filling in his driver's log and his pay claims. (Tr. 313-15, 319).

15. Shortly after Complainant underwent his second refresher course in December 2002, he filed three more pay claims. (Tr. 186-87). Mr. Padalecki sent the pay claims to the payroll department for investigation. (Tr. 188). On the first claim, there was a discrepancy between the daily log and Complainant's actual sign in time, as well as a claim for protection pay when he had not been assigned protection. (Tr. 194). On the second claim, Complainant claimed an arrival delay time which was one hour later than the time he actually arrived, according to the log. (Tr. 196). On the third claim, Complainant claimed protection pay when in fact he should have been off duty for two hours between the segments of his scheduled run. (Tr. 197-99). In sum, these pay claims exhibited the same problems as the pay claims that Mr. Douglas had addressed in both the refresher courses. (Tr. 200).

16. On January 15, 2003, Complainant was terminated for failure to comply with company rules and federal regulations regarding proper logging of his tours and erroneous pay claims. (Tr. 200-01, 244; RX. 8). The decision to terminate Complainant was made no later than January 10, 2003. (Tr. 252). In deciding to terminate Complainant, Respondent took into consideration Mr. Douglas' memo, Mr. Zendejas' letter, Mr. Chinn's letter, Mr. Padalecki's letter, the written warning to Complainant and Complainant's own statements and actions. (Tr. 259-62, 264-65). During this meeting, Mr. Padalecki spoke with Complainant about the need to comply with company policy and the fact that Complainant had refused to do so. Complainant told Mr. Padalecki that he would continue to log his hours the same way, regardless of being terminated. (Tr. 248-49).

17. Under the current collective bargaining agreement between Respondent and National Local Union 1700, there is no set time frame for filing pay claims. (Tr. 76, 78).

18. On January 22, 2003, Complainant filed a complaint with the Department of Labor alleging that Respondent had discriminated against him in violation of Department of Transportation regulations and the STAA. (JTX. 1).

19. Since his termination, Complainant has been drawing unemployment compensation in the amount of about $370 per week. (Tr. 143-44). He has applied for at least two positions per week since he was terminated. (Tr. 148). Complainant has a special permit to teach mathematics and has applied for teaching positions at various school districts. At the time of hearing, the schools had not yet done their hiring for the fall of 2003. Complainant has also applied for legal assistant positions but has had difficulty finding employment due to lack of employment opportunities in Laredo. (Tr. 145-47).

LAW AND CONTENTIONS

The Secretary has stated that the STAA should be interpreted liberally in order to promote an interpretation of the Act which is consistent with its congressional intent, namely the promotion of commercial motor vehicle safety on the nation's highways. See generally Boone v. Trans Fleet Enter., Inc., 90-STA-7 (Sec'y July 17, 1991), aff'd sub nom. Trans Fleet Enter., Inc. v. Boone, 987 F.2d 1000 (4th Cir. 1992); Somerson v. Yellow Freight Systems, Inc., 98-STA-9 and -11 (ARB Feb. 18, 1999). This statute provides protection for employees of commercial motor carriers in the event that they are asked to violate federal law in order to comply with company rules or orders. Respondent has stipulated that it is a commercial motor carrier and that the buses operated by Complainant are commercial motor vehicles. The STAA is the applicable law in this case.

The STAA states in pertinent part: "A person may not discharge an employee . . . because . . .the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A). Internal complaints to any level of management have consistently been held to be "complaints" under this provision. Zurenda v. J & K Plumbing & Heating Co. Inc., 97-STA-16 (ARB June 12, 1998); Doyle v. Rich Transport Inc., 93-STA-17 (Sec'y Apr. 1, 1994). Complaints do not have to refer to specific safety standards in order to be protected. See Davis v. H.R. Hill, Inc., 86-STA-18 at 3-4 (Sec'y Mar. 19, 1987); Nix v. Nehi-R.C. Bottling Co., Inc, 84-STA-1 at 4 (Sec'y July 13, 1984). Further, the alleged safety violations

need not be proven in order for the complaints to be considered protected activity. Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992).

To prevail on a whistleblower complaint under the STAA, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. Byrd v. Consolidated Motor Freight, 90-STA-9 (ARB May 5, 1998) (citing Shannon v. Consolidated Freightways, 96-STA-15 (ARB Apr. 15, 1998), slip op. at 5-6). A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action and (4) the existence of a "causal link or nexus," *e.g.*, that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. Byrd, 90-STA-9 (citing Shannon, slip op. at 6; Kahn v. United States Sec'y of Labor, 64 F.3d 261, 277 (7th Cir. 1995)).

A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action, but rather his protected activity was the reason for the action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 406-08 (1993).

However, since this case was fully tried on its merits, it is not necessary for the Court to determine whether Complainant presented a prima facie case and whether Respondent rebutted that showing. See Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1063 (5th Cir. 1991); Ciotti v. Sysco Foods of Philadelphia, 97-STA-30 at 4 (ARB July 8, 1998). Once the respondent has produced evidence in an attempt to show that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a prima facie case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he did not, it matters not at all whether he presented a prima facie case. If he did, whether he presented a prima facie case is not relevant. Somerson, 98-STA-9 at 8.

Once the respondent has articulated a legitimate nondiscriminatory reason for its adverse employment action, the burden shifts to the complainant to demonstrate that the respondent's proffered motivation was not its true reason but is pretextual and that its actions were actually based upon discriminatory motive. Leveille v. New York Air Nat'l Guard, 94-TSC-3 and -4 at 7-8 (Sec'y Dec. 11, 1995); Carroll v. Bechtel Power Corp., 91-ERA-46 at 6 (Sec'y Feb. 15, 1995). The complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence.

Zinn v. University of Missouri, 93-ERA-34 at 4 (Sec'y Jan. 18, 1996). As noted above, the complainant retains the ultimate burden of proving that the adverse action was in retaliation for the protected activity in which he allegedly engaged, and thus was in violation of the STAA.

The Parties do not dispute that Complainant was terminated, which is an adverse employment action. The initial focus of the dispute is twofold: first, whether Complainant's numerous complaints and grievances filed with the union and various federal agencies, alleging safety violations, constituted protected activity under the STAA and relevant case law, and second, whether Complainant's refusal to log his time in accord with Respondent's directives was a protected activity under the STAA and relevant case law. If it is determined that any of these activities constituted protected activity, the Court must decide whether Complainant was terminated because of his protected activity.

Complaints and Grievances

According to Complainant, the issues with his driving logs and pay claims, which ultimately led to his termination, only arose after he became a union steward and began lodging complaints against Respondent with the Department of Transportation. After becoming a union steward, Complainant filed numerous complaints and grievances during the time period from February 12, 2002, and January 15, 2003. These complaints, which were filed both on Complainant's behalf and upon the behalf of fellow drivers, were lodged with the union as well as various federal government bodies, including OSHA, NIOSH, NLRB and FMCSA. The complaints alleged various safety violations, including an allegation that Respondent asked Complainant to falsify his driving logs in order to comply with federal regulations, an allegation that Respondent required its drivers to log on duty time as off duty in order to escape federal regulations on driving time and an allegation that Mr. Rose, the district manager, utilized intimidation and harassment tactics to prevent drivers from making rest stops, creating a safety hazard to "any and all highway users." While union complaints and activities are not ordinarily protected activities, because these complaints were safety-related I find that the following complaints constitute protected activity for purposes of the STAA: CX. A-100, A-95, A-79, A-77, A-66, A-61, A-12.

Driving Logs

Complainant alleges that he was fired because he refused to falsify his drivers records. Complainant alleges that because he did not have a regular run, he was entitled to protection pay at various times due to his status as an extra board driver. He further alleges that he logged on duty not driving for several years without being told the policy about on duty not driving or what constituted off duty. As noted above, Complainant argues that the on duty not driving issue only arose after he became a union steward and began lodging complaints

against Respondent with the Department of Transportation. Complainant argues that he was following federal regulations when he refused to log off duty between his runs and submitted his pay claims for protection pay and that he would have been falsifying records if he had logged off duty according to Respondent's instructions. Respondent, on the other hand, argues that it did not ask Complainant to falsify his records but rather instructed Complainant on how to correctly log his time and that Complainant was only terminated after he continually failed to comply with these instructions.

Complainant freely admits that he continued to log time in his own way even after repeated instructions and warnings and after two refresher courses with Mr. Douglas on how to log time. He argues that logging time in this way constituted protected activity. In order to determine whether or not Complainant was following federal regulations by remaining on duty during the times in question, such that his refusal to log his time in accord with Respondent's instructions is a protected activity, it is necessary to examine the relevant statutory definition of on duty time. 49 C.F.R. § 395.2 defines on duty time as:

> All time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. *On duty time* shall include:
>
> (1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper . . . waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier.

49 C.F.R. § 395.2 (2001). Respondent provided this definition, included in a copy of the Federal Motor Carrier Safety Regulations, to all its employees, including Complainant. Thus, Respondent's own company policy not only conformed to the federal regulations, but the two were one in the same. For Respondent's employees, off duty time occurs when a driver is relieved of all duties and may leave the premises. In between tours, when a driver has two or three hours relief from duty, he is considered to be off duty. According to Respondent, Complainant was required to log the time between run segments as off duty, as opposed to on duty, unless he was previously informed by a dispatcher that he had been placed on protection.

Complainant argues that he remained on duty between segments of scheduled runs in accord with the federal regulation cited above by virtue of his status as an extra board, as opposed to a regular, driver. As an extra board driver, Complainant was sometimes entitled to protection pay if he was called up a few hours before a scheduled run to "protect" that run. However, an extra board driver is only entitled to such pay if a dispatcher has placed him on protection. A driver cannot place himself on protection without the authorization of the dispatcher. In addition, if an extra board driver is in the midst of covering a scheduled run,

he is not entitled to protection pay while taking a break between segments of the run, because he is already obligated to complete the run which was assigned. Since each scheduled run is worth a certain set amount of pay, continuing to log on duty between segments of the run or attempting to claim protection pay for this down time is in effect an attempt to get paid twice for the same period of time.

In another case in which the meaning of "on duty" was disputed as between the complainant and the respondent, the complainant, a bus driver, was ultimately found to have correctly logged his time as on duty when he was "required to remain with the bus, or in the vicinity; to attend to the needs of the group he was transporting, to maintain or fuel the bus, or to attend to breakdowns . . . . Even . . . when [Complainant] returned to base he was standing by to pick up a group in a few hours and that is, properly, considered on duty time." Polger v. Florida Stage Lines, 94-STA-46 (Sec'y Apr. 18, 1995). This case illustrates the types of things which will allow a break to qualify as on duty time, even if the employer has mistakenly told the driver that he must go off duty.

While Polger contemplates a situation in which a driver can rightly remain on duty in the event of a breakdown, Polger can be distinguished from the situation in this case in order to show that Complainant wrongly remained on duty when he consistently refused to log off duty time as per Respondent's directives. In the present case, Complainant has offered no evidence to indicate that he was entitled to log this time between runs as on duty simply by virtue of his status as an extra board driver. Despite the fact that Complainant, as an extra board driver, potentially could be asked to stand by to protect a run, even if he was in the midst of completing a scheduled run, Complainant has shown no evidence that he was in fact asked to protect runs and was therefore entitled to the protection pay but was denied this pay. In fact, Mr. Padalecki testified that even Complainant's late pay claims would be reviewed, and if he was entitled to protection pay, he would be compensated. Further, Complainant has failed to establish that he had any other reason for remaining on duty not driving when he spent two to three hours waiting between segments of a run.

The Federal Highway Administration has issued helpful guidelines for interpreting the STAA regulations. For example, if a commercial motor vehicle driver is to record meal and other routine stops made during a tour of duty as off duty time, the following conditions must be met:

> 1. The driver must have been relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo of passengers it may be carrying.
> 2. The duration of the driver's relief from duty must be a finite period of time which is of sufficient duration to ensure that the

> accumulated fatigue resulting from operating a CMV [commercial motor vehicle] will be significantly reduced.
> 3. If the driver has been relieved from duty, as noted in (1) above, the duration of the relief from duty must have been made known to the driver prior to the driver's departure in written instructions from the employer.
> 4. During the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing and to leave the premises where the vehicle is situated.
> 62 Fed. Reg. 16,422 (1997) (to be codified at 49 C.F.R. pt. 3).

Further, the guidelines provide that "[i]t is the employer's choice whether the driver shall record stops made during a tour of duty as off duty time." Id. In other words, it is not up to the driver to decide whether or not to record a break as off duty time. Respondent's policy, for example, is that a two to three hour layover between segments of a scheduled run should be logged as off duty time. During that time, a driver is relieved of all responsibilities for his bus until it is time for his thirty minute pre-trip inspection. The drivers are free to leave the bus terminal. Complainant in this case has not provided any evidence that his time between run segments did not conform to the guidelines above for an off duty break. Consequently, Complainant has failed to establish that he was correct in logging this time as on duty not driving, contrary to Respondent's instructions.

Since Complainant has failed to show that he correctly logged the disputed periods of time as on duty, he has also failed to establish that he engaged in any protected activity under the STAA when he persisted in doing so. I find that Complainant's refusal to complete his driver's logs as directed by Respondent does not constitute protected activity for purposes of the STAA.

The Reason for Complainant's Termination

Having found that Complainant's safety-related union activities constitute protected activity for purposes of the STAA, the Court must determine whether this activity was the reason for his termination. Respondent argues that Complainant was terminated for his failure to follow company procedures and federal regulations for logging his time, not for his union activities. In support of its argument, Respondent offered the testimony of Mr. Rose, Mr. Padalecki and Mr. Douglas to establish that Complainant was given many opportunities to change his behavior before he was actually terminated for his failure to comply with company policy. Mr. Rose testified that Complainant was a good driver who had no safety problems and had a reputation for good customer service. When Mr. Rose determined that Complainant was logging his time incorrectly and filling out his pay claims erroneously and in an untimely manner, he sent Complainant to a refresher course with Mr. Douglas so that

Complainant could learn the proper way in which to log his time and fill out his pay claims. Although Mr. Douglas explained all the rules to Complainant, Complainant informed Mr. Douglas that he would continue to log the time in his own way. Despite a written warning in May 2002, Complainant continued to log off duty time as on duty not driving time and continued to submit pay claims seeking compensation for this time. Because Complainant persisted in doing things in his own way, management ordered another refresher course with Mr. Douglas. Once again, Mr. Douglas explained the company policy to Complainant, and once again, Complainant told Mr. Douglas that he would continue to log his time in his own way. Shortly thereafter, Complainant filed three more erroneous pay claims and was then terminated for failure to comply with Respondent's directives and federal regulations.

Despite Complainant's allegation that Respondent only became interested in his pay claims after he filed numerous complaints with the union and government agencies, the facts show that as early as February 14, 2002, Respondent became concerned about Complainant's tardy pay claims. Prior to this, Complainant had filed only one grievance that could questionably be considered protected activity. (CX. 1, p. 100-102). This grievance appears to be mainly concerned with the "policy" concerning rest stops for passenger rest/meal stops. I find the overwhelming weight of the evidence supports the finding that Respondent was interested in Complainant's pay claims because of the administrative burden involved in resolving the late claims and the fact that only Complainant was filling out the driving logs as he chose. I further note that two of the instances of protected activity (CX. A, pp 12, 13) occurred after January 10, 2003, the date the decision was made to terminate Complainant.

In sum, Respondent's evidence shows that Complainant was instructed twice on the proper way to log his time and fill out his pay claims and was given several chances to correct his methods of doing these activities, yet Complainant willfully persisted in disobeying the company policy and applicable federal regulations up until the day that he was terminated. I found the Respondent's witnesses on this issue to be very credible. Thus, Respondent has shown a legitimate nondiscriminatory reason for Complainant's termination. Complainant, meanwhile, has provided no evidence, other than his own testimony, to support the proposition that Respondent's decision to terminate his employment resulted from his protected activities, such that his failure to comply with company policy was a mere pretext that Respondent utilized in order to get rid of him.

I find that Complainant's termination was not an act of retaliation against him for his protected activities. Complainant has failed to prove that he was terminated in violation of the STAA.

I find that Complainant was terminated because he failed to log his time in the correct manner and to timely submit his pay claims, according to both company policy and federal regulations. Accordingly, I find that the preponderance of the evidence establishes that Respondent terminated Complainant for reasons unrelated to any activities protected under

the STAA and recommend that the Secretary enter the following order pursuant to 29 C.F.R. § 1978.109(c)(4):

ORDER

The complaint of Nelson Hogquist is **DENIED**.

So ORDERED.

A

LARRY W. PRICE
Administrative Law Judge

LWP:bab

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).